



REASONS FOR GRANTING THE WRIT.

One of the grounds alleged in the demurrer to the petition for writ of habeas corpus, and approved by the Federal District Court, is that petitioner had not exhausted his remedies in the State Courts. An examination of the record would appear to prove the fallacy of that contention. Petitioner through able and energetic counsel vainly adopted every possible legal method to have the case reviewed on its merits in the State Courts. Instead of permitting petitioner to present evidence in support of the averment in his petition for writ of habeas corpus that the discovery of a large portion of the stolen goods in the home of the accomplice, Poznansky, served to indicate that his conviction was the result of perjured testimony, the District Court deprived petitioner of his rights by sustaining the demurrer to the petition.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

It is important to note that in the trial of the case in the Criminal Court of Cook County, Illinois, which resulted in the conviction of petitioner on the testimony of the three accomplices who stated that at the point of a gun they robbed a certain person of a quantity of furs, and on the same day sold and delivered them to petitioner who it was charged knew the goods had been stolen, it does not appear that any of the stolen property was found in petitioner's possession nor produced at the trial. Thereafter, and while the judgment of conviction was pending on appeal to the Supreme Court of the State of Illinois, police officers of the City of Chicago searched the home of one of the accomplices who had testified at the trial as to the robbery of the furs and their sale to petitioner and there discovered a large portion of the stolen property. Relief for petitioner was sought in the state courts by means of a proceeding in the nature of a writ of error coram nobis, on which a jury

trial was requested on the issues of fact. This perfectly reasonable request was denied, though it would appear that petitioner was entitled to the same measure of justice on the issue of fact as was accorded as a matter of right at his trial. The case was decided against petitioner and affirmed on appeal to the Supreme Court of the State of Illinois, which court also denied petition for rehearing. Thus, petitioner was forced to the relief afforded by the habeas corpus acts in the Federal Courts, having exhausted his remedies in the State Courts. (*Amrine v. Times*, 131 F. (2d) 827, 832, C. C. A. 10th; *Cary v. Brady*, 125 F. (2d) 253, 254, C. C. A. 4th; *Sharpe v. Buchanan, Warden*, 317 U. S. 238). In *Ex Parte Hawk*, 321 U. S. 114, 64 Sup. Ct. 448, this court remarked that until petitioner in that case sought without avail his remedy by the common law writ of error coram nobis it could not be said that his State remedies had been exhausted. In that case this Court pointed out that the often quoted statement in *United States ex rel. Kennedy v. Tyler*, 269 U. S. 17, that the writ of habeas corpus in the Federal Courts is available only "in rare cases" presenting "exceptional circumstances of peculiar urgency" was made in a case where petitioner had not exhausted his State remedies and is inapplicable to one in which petitioner has exhausted his State remedies and in which he makes a substantial showing of a denial of a Federal right. Again, it is pointed out that if State process affords no remedy, as in *Mooney v. Holohan*, 294 U. S. 115, or because the remedy afforded by State process proves in practice unavailable or seriously inadequate, *Moore v. Dempsey*, 261 U. S. 86, petitioner is without remedy unless a Federal Court entertains his petition for habeas corpus, *Ex parte Hawk, supra*, 64 Sup. Ct. 448, 321 U. S. 114. If the furs discovered and seized by the Chicago police in the home of the accomplice Poznansky were in truth and fact, as alleged, a large part of the furs stolen by the three accomplices and testified to as having been sold and delivered to petitioner then it follows that petitioner was convicted on perjured testimony

unless a satisfactory explanation is made as to how the furs came into Poznansky's possession. No better way exists to establish the facts than by a full hearing under the habeas corpus acts. R. S. Sec. 760 provides for the procedure in such cases before the courts "so that thereby the material facts may be ascertained" and R. S. Sec. 761 emphasizes that the court shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments and thereupon to dispose of the party as law and justice require. The manner in which the district court disposed of this case appears to have deprived petitioner of his right to due process of law by failing to proceed to determine the facts by hearing the testimony and arguments as required by R. S. Sec. 761.

CONCLUSION.

For the reasons stated it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX

APPENDIX.**Statutes Involved.**

R. S. Sec. 751. United States Code, Title 28, Sec. 451.

Power of courts. The Supreme Court and the District courts shall have power to issue writs of habeas corpus.

R. S. Sec. 752. Act of Feb. 13, 1925, 43 Stat. 940. United States Code, Title 28, Sec. 452.

Power of judges. The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. The order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

R. S. Sec. 754. United States Code, Title 28, Sec. 454.

Application for; complaint in writing. Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application.

R. S. Sec. 755. United States Code, Title 28, Sec. 455.

Allowance and direction. The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

R. S. Sec. 756. United States Code, Title 28, Sec. 456.

Time of return. Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance

of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days.

R. S. Sec. 757. United States Code, Title 28, Sec. 457.

Form of return. The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party.

R. S. Sec. 758. United States Code, Title 28, Sec. 458.

Body to be produced. The person making the return shall at the same time bring the body of the party before the judge who granted the writ.

R. S. Sec. 759. United States Code, Title 28, Sec. 459.

Day for hearing. When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time.

R. S. Sec. 760. United States Code, Title 28, Sec. 460.

Denial of return; counter allegations; amendments. The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained.

R. S. Sec. 761. United States Code, Title 28, Sec. 461.

Summary hearing; disposition of party. The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

Constitution of the United States, Amendment V.

No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *.

Constitution of the United States, Amendment XIV.

* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *

